IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: JR 543/06

In the matter between:

BTI WORLD TRAVEL APPLICANT

AND

ATHINA ALEXANDRAKIS RESPONDENT

JUDGMENT

N**YATHELA** AJ

Introduction

[1] This is an application for rescission of judgement in terms of Rule 16A of the Rules of the Labour Court.

[2] The judgment which applicant seeks to rescind was handed down by Ngcamu AJ. At paragraph 2 of the judgement the learned Judge held as follows: "*The notice of Motion was served on the respondents. None of the respondents have opposed the application*".

[3] At paragraph 11 of the judgement, the learned judge made the following order:

"*The award is reviewed and set aside.*

The dispute is remitted to the first respondent to be arbitrated by a commissioner other than the second respondent.

There is no order for costs".

[4] The application for rescission is opposed by the respondent.

The parties

[5] The applicant, BTI World Travel is a company duly incorporated in accordance with the company laws of the Republic of South Africa.

[6] The respondent is Athina Alexandrakis, a former employee of the applicant.

The facts

[7] On 10 March 2006, respondent lodged an application for review with the Labour Court reviewing an award made by the CCMA commissioner under case number GAJB 11084/05. The commissioner had found that: "*The dismissal of the applicant was substantively and procedurally fair. Her case is dismissed.*"

[8] Applicant filed a notice to oppose the review application on 11 April 2006.

[9] On 05 June 2006, respondent served applicant with a record of the CCMA arbitration proceedings. However, the said record was incomplete.

[10] On 20 June 2006, respondent served applicant with her supplementary affidavit.

[11] The Labour Court set the review application on an unopposed roll for hearing 27 February 2007. Ngcamu AJ heard the application and granted judgement in favour of the respondent as stated in paragraph 3 above.

[12] Following the above judgement, the CCMA served a notice of set down of the arbitration hearing on the applicant on 21 June 2007. The arbitration was scheduled to take place on 15 August 2007.

[13] Upon enquiry, the CCMA furnished the applicant with a copy of the Labour Court judgement referred to in paragraph 3 above. According to the judgement, a review was heard on an unopposed basis on 27 February 2007 and judgement was granted in favour of respondent in the absence of the applicant.

[14] On 12 July 2007, applicant lodged an application for rescission of the judgement referred to in paragraph 3 above. It is this application for rescission which is the subject of the current proceedings.

Grounds for review

In the founding affidavit the applicant contends that:

[15] Applicant not in wilful default

15.1 Prior to 21 June 2007, the applicant was not aware that:

(a) the review application was set down and heard on 27 February 2007,

(b) the Labour Court, per Ncgamu AJ, had delivered a judgement dealing with the merits of the review

15.2 The applicant only became aware of the Labour Court judgement on 21 June 2007 when it was served with a copy thereof by the CCMA. The applicant never received a notice of set down of the review application.

15.3 In terms of existing practice of the Labour Court, the registrar must notify the parties of the date, time and place for the hearing of the review application even where a respondent has not delivered an answering affidavit in support of its opposition of the review application. In this case, applicant has not been notified of the date, time and place for hearing of the review application despite that applicant had served and filed a notice to oppose the review application.

[16] Bona fide defence

16.1 The applicant contends that it has a bona fide defence and the application is not made merely for the purpose of harassing the third respondent in that:

(a) the respondent had failed to file a complete record of the arbitration proceedings. The record of the arbitration proceedings had not been reconstructed despite the fact

that it was possible to reconstruct same. Applicant was never invited to assist in the reconstruction of the record.

(b) there is no evidence that the commissioner refused to furnish the handwritten notes.

16.2 In Paragraph 2 of the judgement, Ncgamu AJ stated that: *"The notice of Motion was served on the respondents and that none of the respondents have opposed the application"*. When he made the order, Ncgamu AJ was not aware of the fact that applicant had opposed the review application.

Analysis

[17] The applicant contends that a default judgement was erroneously sought in its absence as contemplated in Rule 16A(1)(i) of the Rules of the Labour Court.

[18] The applicant further argued that since it had filed a notice to oppose the review application, the registrar was still obliged to serve it with a notice of set down despite that it had not filed an answering affidavit.

[19] In this matter, the question which I have to decide is whether the fact that the applicant was not served with a notice of set down in the circumstances renders the default judgement granted to be a judgement granted in error? In the event the judgement was granted in error, I will have to determine whether the applicant has shown good cause which justify the rescission of the default judgement, as was held in *Shoprite*

Checkers (Pty) Ltd v CCMA & others (2007) 28 ILJ 2246 (LAC), Edgars Consolidated Stores Ltd v Dinat & others (2006) 27 ILJ 2356 (LC) and Chetty v Law Society of the Transvaal 1985 (2) SA 756 (AD).

[20] The crux of the applicant's argument that the default judgement was granted in error is that the court was obliged to notify the applicant about the date and time of hearing since it had filed a notice to oppose the review application.

[21] There is no dispute that the applicant after filing the notice to oppose the review did not file an answering affidavit. Applicant's reason for not filing an answering affidavit is that respondent served him with an incomplete record of the arbitration proceedings.

[22] Rule 7A(8) of the Rules of the Labour Court which deals with the service of a record of proceedings in review application provides as follows: "*The applicant must within 10 days after the registrar has made the record available either –*

(a) by delivery of a notice an accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit; or

(b) deliver a notice that the applicant stands by its notice of motion.

[23] Rule 7A(9) provides that: " *Any person wishing to oppose the granting of the order prayed in the notice of motion must, within 10 days after receipt of the notice of amendment or notice that the applicant stands by its notice of motion, deliver an affidavit in answer to the allegations made by the applicant*".

[24] In this matter, it is common cause that respondent served applicant with a record of the proceedings contemplated in Rule 7A(8) above and proceeded to serve and file a supplementary affidavit as well.

[25] It is further not in dispute that despite receiving the record of proceedings and the supplementary affidavit, applicant did not file the answering affidavit as required by Rule 7A(9).

[26] Applicant's reason for not filing an answering affidavit is that the record filed by the respondent was incomplete and thus applicant was not obliged to file an answering affidavit in view of the incompleteness of the record.

[27] There is no dispute that the record was incomplete in some respects. However, despite being served with the supplementary affidavit which was based on the incomplete record, applicant did not object to the incompleteness of the record or file an answering affidavit. Applicant

elected to simply ignore the process as it believed that the record was incomplete.

[28] Rule 16(1) of the Rules of the Labour Court provides: *"If no response has been delivered within the prescribed time period or any extended period granted by the court within which to deliver a response, the registrar must, on notice to the applicant(s), enrol the matter for judgement by default.*

[29] In my view, applicant had a duty to raise an objection to the incomplete record or the supplementary affidavit instead of acting like the documents have never been served and filed. Its failure to act in the circumstances, constituted a waiver of its right to be served with a notice of set down.

[30] In my view, an applicant who only files a notice to oppose a review application and fails to file any further affidavit or lodge an interlocutory application to deal with any matter he considers to be relevant to the application cannot be said to have filed a response to the application as contemplated in Rule 7A(9) of the Rules of the Labour Court.

[31] It follows therefore that applicant's failure to file an answering affidavit in the circumstances of this case constituted a failure to respond to the review application. Thus Rule 16(1) required the registrar to notify only the respondent (applicant in the review case) about the set down.

[32] Although applicant contended that there is a practice in the Labour Court that a party who filed a notice to oppose an application and did not proceed to file an answering affidavit is entitled to be notified when the matter is set down, he has not provided any authority or evidence of such practice.

[33] In the light of the unambiguous provisions of Rule 16(1) which regulates the set down in such circumstances, I do not accept applicant's contention about the alleged existence of a practice in this regard.

[34] Based on the above reasoning, I have come to the conclusion that applicant was not entitled to be notified about the date of set down of the review application in the circumstances. I further conclude that the default judgement was therefore not granted in error.

[35] In view of the above finding, it is academic to deal with whether applicant has shown good cause for the rescission application.

Order

[36] I make the following order:

(a) The application for rescission is dismissed.

(b) The judgement by Ngcamu AJ stands.

(c) There is no order as to costs.

Nyathela AJ

Date of Hearing : 29 April 2009

Date of Judgment : 22 July 2009

Appearances

For the Applicant : Adv. S.S Mphahlani

For the Respondent: Athina Alexandrakis appeared in person